ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

IN RE:	DOCKET NO. CAA-9-2005-0018
LISTON BRICK COMPANY OF CORONA 3710 TEMESCAL CANYON ROAD CORONA, CALIFORNIA 92882,	REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION; ATTACHED AFFIDAVIT
RESPONDENT.	

I. INTRODUCTION

Pursuant to the authority of section 112 of the Clean Air Act ("CAA"), EPA promulgated a series of National Emissions Standards for Hazardous Air Pollutants ("NESHAPs"). See, e.g., the Secondary Aluminum NESHAP, 40 C.F.R. Part 63, Subpart RRR and the Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M. The Ninth Circuit has opined that "a strict liability standard applies to NESHAP violations." United States v. Trident Seafoods Corp., 92 F.3d 855, 861 (9th Cir. 1996)(string cite omitted in this asbestos NESHAP case). See also United States v. B & W Inv. Properties, 38 F.3d 362, 367 (7th Cir. 1994)(asbestos NESHAP case); United States v. Ben's Truck and Equipment, Inc., 1986 U.S. Dist. Lexis 25595 (D. Cal. 1986)(asbestos NESHAP case). As discussed in more detail below, Respondent ("Liston") is strictly liable for the violations alleged by Complainant ("EPA").

II. DISCUSSION

A. No genuine issue of material fact exists with respect to the counts related to the site-specific test plan and the performance test.

Liston was required to comply with the requirements of the Secondary Aluminum NESHAP by March 24, 2003. 40 C.F.R. § 63.1501(a). The two requirements of the Secondary Aluminum NESHAP at issue in this case are: 1) Liston's obligation to prepare "a site-specific test plan which satisfies all of the requirements (of the Secondary Aluminum NESHAP), and must obtain approval of the plan (from EPA)" by March 24, 2003, and 2) Liston's obligation to conduct a performance test[1] for dioxin and furans by March 24, 2003. See 40 C.F.R. § 63.1511.

Liston argues that it had met its obligation for the source (performance) test based on a source test report completed on August 15, 2003, which was submitted to EPA. Liston's Memorandum of Points and Authorities in Opposition to Complainant's Motion for Accelerated Decision in Liability ("Liston's Opposition") at 6-7. The argument fails for two reasons. First, the source test Liston references has nothing to do with any of the requirements of the Secondary Aluminum NESHAP. The Source Test was entitled "NOx Emissions Testing per RECLAIM Rule 2012 Furnace #2 (D2) at Liston Brick Company." See Comp. Exh. 11 at response #11. NOx (or nitrogen oxides) is a completely different pollutant than dioxin and furans, and in fact, is not subject to section 112 of the CAA, which is the basis for this action. Second, even if this test met the source test requirements at issue, which it does not, Liston is strictly liable for not having conducted the test by March 24, 2003.

Liston also argues that "the EPA waived its March 24, 2003 deadline due to: (1) its failure to mention a violation of the March 2003 deadline until an Administrative Order dated

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[1]The equipment that needed to be tested for dioxin and furans include the thermal chip dryer and perhaps the furnaces (depending on the information Liston ultimately provides).

October 20, 2004, (2) its unconditional continuances of Liston's test protocol and performance test deadlines, and (3) its August 2005 change of heart with respect to the number of ports required for testing." Liston's Opposition at 2.

The Secondary Aluminum NESHAP provides no legal basis for EPA to waive the March 24, 2003 compliance deadline as Liston suggests and Liston provides no legal authority for such a waiver.[2] Further, EPA did not waive a violation because of a failure to mention the violations to Liston. Notice of violations based on section 112 of the CAA do not require notice prior to commencing an action for civil penalties. See United States v. B & W Inv. Properties, 38 F.3d at 366. Finally, Liston's arguments regarding EPA's granting "continuances" and agreeing to change the number of ports (locations) to conduct the performance test have no bearing on a strict liability analysis. Whether EPA granted Liston "continuances" (either in the form of extensions to reply to information requests or allowing additional time so EPA could assist Liston in determining appropriate parameters for the performance test) or whether EPA attempted to accommodate Liston in the number of ports (locations) where it would be required to conduct the performance test, has more to do with EPA trying to go beyond its obligations to assist Liston to come into compliance. Liston is incorrect in attempting to use EPA's good nature as a basis for claiming that EPA waived a legal deadline. The plain and simple fact is that there is no genuine issue of material fact. Liston did not comply with the Secondary Aluminum requirements by March 24, 2003, and accordingly, is strictly liable.

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[2]The general NESHAP provisions have limited circumstances where a performance test can be waived. However, Liston never requested a waiver and provided no information to suggest it might be eligible to meet the requirements. See 40 C.F.R. § 63.7(h).

B. No genuine issue of material fact exists with respect to the count related to an incomplete response to information requests issued pursuant to section 114(a) of the CAA.

"Violations of Section 114(a) reporting requirements (of the CAA) . . . are reviewed under the strict liability standard of the Act." United States v. Hugo Key and Son, Inc., 731 F.Supp. 1135, 1143 (D.R.I. 1989)(citation omitted). EPA's count alleges that Liston provided incomplete responses to section 114 information requests. Any one of the failures identified in EPA's Memorandum to Support its Motion for Accelerated Liability would result in liability for providing an incomplete information request.[3] The question of the seriousness of the violation would be resolved at the penalty portion of the hearing.

Liston does not contest EPA's assertion that Liston failed to provide quarterly usage figures for chlorine in response to an information request. Instead it states that: "[B]y the time chlorine usage figures were demanded in May 2005, Liston had ceased operations. For the reasons specified in the preceding subsection, after May of 2005, no liability exists in regards to HAP (hazardous air pollutant) disclosure." Liston's Opposition at 9.

EPA disagrees, as a matter of law, that Liston's legal obligation to respond to an information request issued pursuant to section 114(a) of the CAA extinguished in May 2005 because it had allegedly ceased operations. Section 114(a)(1)(G) of the CAA provides: "the Administrator may require any person . . . who the Administrator believes may have information necessary for the purposes set forth in this subsection . . . to . . . provide such information as the

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[3]EPA's has alleged only one count for Liston providing complete information, although arguably each instance of providing incomplete information might have been plead separately. EPA's Reply Brief only focuses on two instances where incomplete information was provided. See EPA's Memorandum to Support its Motion for Accelerated Liability (pages 11-13) for additional examples.

Administrator may reasonably require . . . " In this case EPA has requested basic information to determine compliance with the Secondary Aluminum NESHAP. EPA may reasonably require such information from "*any person*" and is not limited to owners and operators, as Liston's argument suggests. Accordingly, Liston's failure to provide chlorine usage figures in its response to the July 20, 2004 information request constituted an incomplete response to an information request and a violation of section 114(a) of the CAA under the strict liability standard.

Moreover, even assuming Liston's legal argument is correct, which it is not, Liston failed to respond to the information request issued pursuant to section 114 of the CAA during a period of time when even Liston acknowledges itself as an owner or operator. On July 20, 2004, nine months prior to May 2005 when Liston asserts it was no longer operating, EPA's information request 2(b) stated: "Provide quarterly usage figures of chlorine from March 2003 to the present and any invoices or other documents to support Liston's usage figures." Comp, Exh. 8. EPA's information request was nine months prior to May 2005 and should have been answered using Liston's own logic.

Liston also failed to provide accurate information concerning the basics of its aluminum processing business. Liston provided one set of information stating that Liston charged 7 million tons per year, which is approximately 799 tons per hour based on EPA's calculation in its Memorandum to Support an Accelerated Decision on Liability. Liston in its Opposition Memorandum then acknowledges "an error" in the charging rate stating, with no data to support its assertion, that it meant 7 million pounds charged during March 2003 to March 2004, instead of 7 million tons charged during that period. Liston's Opposition at page 9. The response

provided to the information request was incomplete because it provided an incorrect response.[4] Accordingly, under a strict liability standard there is no genuine issue of material fact as to the count that Liston provided an incomplete response to an information request issued pursuant to section 114(a) of the CAA.

C. No genuine issue of material fact exists with respect to the count related to failure to respond to the May 17, 2005 information request issued pursuant to section 114(a) of the CAA.

Liston acknowledges a strict liability violation of section 114(a) of the CAA when it states: "Liston does not dispute that it did not respond directly to the questions raised in the May 17, 2005 request." Liston's Opposition at 10. In fact, Liston did not respond at all which constitutes a violation of section 114(a) of the CAA.

Instead, Liston claims in its Opposition that "Liston did send a correspondence to the EPA subsequent to the May 17, 2005 request indicating that Liston was no longer in an operative condition." Liston's Opposition at 10. Liston reasons that "the EPA lacks jurisdiction to penalize Liston for failure to respond to its May 17, 2005 demand, because Liston had ceased to be a secondary aluminum producer at that point." Id.

Again, as discussed above, Liston is wrong as a matter of law. Section 114(a)(1)(G) authorizes EPA to request information pursuant to section 114(a) of the CAA from "*any person*". Accordingly, EPA does not lack statutory authority to request this information and Liston cannot

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[4]As discussed in EPA's Memorandum to Support its Motion for Accelerated Decision, the amount that Liston charges per hour is a significant fact for determining compliance with the Secondary Aluminum NESHAP. See pages 9-11. Unfortunately, Liston's latest response still raises more questions than it answers. The 7 million pounds per year translates to 1.35 tons per hour, assuming a 10 hour workday. This number is difficult to reconcile with the source test figure which is "approximately 6.5 tons per hour."

glibly ignore such a request. Liston's failure to respond adequately, or at all, to EPA's reasonable requests for information cannot be allowed or the EPA's attempt to enforce the CAA will be rendered ineffective.

Liston's factual argument is that Liston was no longer in an operative condition as of May 2005, and therefore, Liston is not liable for failing to answer a request for information issued on May 17, 2005. Although Liston is wrong as a matter of law, for the reasons described above, Liston is also factually incorrect that it had ceased to be a secondary aluminum producer when the May 17, 2005 information request was issued. The correspondence Liston relies on is dated June 15, 2005, *one month after* the May 17, 2005 information request, and provides direct evidence that as of June 15, 2005, Liston was still repairing its furnace (curing its furnace), and therefore, Liston had *not* ceased to be a secondary aluminum producer by May 17, 2005.[5] The full text of the letter from Mr. Hall is as follows:

> Please be advised that Liston Brick has not operated its furnace since May 26, 2005 due to refractory issues. We are in the middle of curing the furnace as I write this letter. I will keep you advised. Comp. Exh. 23.

Mr. Hall still has active South Coast Air Quality Management District air permits for his equipment, including the thermal chip dryer and the furnaces. Nothing prevents Liston from continuing to operate its thermal chip dryer while the furnace was being repaired or restarting the furnace after the repairs were completed. Both types of equipment are covered by the Secondary Aluminum NESHAP. Moreover, Mr. Hall's statement that he would keep EPA advised further

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[5]On May 9, 2005, Mr. Hall also sent EPA a letter in response to EPA's approval for Liston to proceed with the performance test stating: "Per your letter dated April 26, 2005, it is physically impossible to meet condition #8. Please advise." See Comp. Exhs. 19 and 20. However, this letter did not indicate that Liston was no longer in an operative condition.

confirms that Liston was still a secondary aluminum producer. If Liston ceased to be a secondary aluminum producer as of May 2005, as Liston suggests, would Mr. Hall need to further advise EPA about the status of repairs on his furnace after June 15, 2005? Whether as a matter of law or as a matter of fact, Liston's failure to reply to EPA's May 17, 2005 information request results in strict liability for a violation of CAA section 114(a) .

In the end, Liston raises an issue related to the penalty amount and not to liability.[6] That is, when did Liston cease operation. Even if Liston's smelting operations were discontinued in May 2005, instead of July 2004, as Liston initially asserted, such "error" means that Liston was out of compliance for over two years (from March 24, 2003 to May 2005) which should result in an increase in the penalty calculation and undermines its attempts to downplay the significance of its noncompliance.

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[6]EPA also moves to amend its Prehearing Exchange to, in part, add the attached affidavit and document that describes a conversation Mr. Hall and his counsel had with EPA where Liston indicated that it wanted to operate the facility in the interim before selling the facility. This document will address the length of violation issue for determining the appropriate penalty. EPA employees Stanley Tong and John Brock may also testify as to facts related to this case that have bearing on the penalty calculations.

III. CONCLUSION

EPA requests this Court issue a decision holding that there is no genuine issue of material fact and Liston is strictly liable for: 1) failure to submit a site-specific test plan by March 24, 2003, 2) failure to conduct a performance test for dioxin and furans by March 24, 2003, 3) providing incomplete responses to information requests issued pursuant to section 114(a) of the CAA and 4) failure to respond to an information request issued pursuant to section 114(a) of the CAA.

Executed this 10th day of July, 2006.

Respectfully submitted,

Dan Reich

Daniel Reich

Assistant Regional Counsel, Region 9

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

IN RE:	)	
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LISTON BRICK COMPANY OF CORONA	)	
3710 TEMESCAL CANYON ROAD	)	
CORONA, CALIFORNIA 92882,	)	
	)	
	)	
	)	
	)	
RESPONDENT.	)	
	)	

AFFIDAVIT

I, John Brock, being duly sworn, depose and say:

1. I am an Environmental Engineer assigned to the Enforcement Office of the Air Division, United States Environmental Protection Agency ("EPA"), Region 9, and I have personal knowledge of the facts set forth in this Affidavit. I have worked in the Air Division for approximately 8 years as a inspector and case developer.

2. For the past 3 years, I have duties as the Air Division's Enforcement lead on the National Emission Standard for Hazardous Air Pollutants ("NESHAP") for Secondary Aluminum Production.

3. This affidavit provides a summary of a telephone conversation that occurred on July 13, 2005, and is based on my attached notes and recollection.

I. CALL PARTICIPANTS

4. This call was between Liston Brick Company of Corona (Liston) and EPA. Present during the call were Daniel Reich, EPA Regional Counsel, Stanley Tong, EPA Environmental

Engineer, myself, Craig Hall, Liston's Manager, and Steven Saleson, Liston's attorney.

II. DISCUSSION OF OPERATING STATUS

5. Liston stated that they have not operated their secondary aluminum production equipment since May 26, 2005. Mr. Hall said they were still attempting to repair the refractory lining of the furnace. He noted that they did some refractory work but discovered that it still leaked when the furnace was restarted. Mr. Hall said he was willing to perform the dioxin/furan test. He also said that he has at least two offers to buy the property, but wants to operate while the sale is pending.

FURTHER DEPONENT SAYETH NOT

Executed this 6th day of July 2006.

I declare under the penalty of perjury that the foregoing is true and correct.*

John Brock
Environmental Engineer
EPA Region 9 - Enforcement Office

*Authorized under 28 U.S.C. § 1746.

CERTIFICATE OF SERVICE

I certify that the original and a copy of the foregoing Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision; Attached Affidavit was hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

and that a true and correct copy was sent by either inter-office pouch mail or First Class Mail, return receipt requested, to:

Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency (1900L)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001 and

Daniel A. Reed
Varner & Brandt, LLP
3750 University Avenue, Suite 610
Riverside, CA 92501

Certified Return Receipt No. 7006 0100 0006 2455 2840

Dated: 7/10/06

By: _____
Air Division
USEPA, Region 9